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CLERK, U.S. DISTRICT COURT,
SOUTHERN DISTRICT OF CALIFORNIA

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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**

10
11 NILSON OROBIO-MINDINERO,
12 Petitioner,
13 vs.
14 UNITED STATES OF AMERICA,
15 Respondent.

CASE NOS. 13-CV-2227-BEN
12-CR-3815-BEN-3

**ORDER DENYING
28 U.S.C. § 2255 MOTION**

16 Petitioner Nilson Orobio-Mindinero moves pursuant to 28 U.S.C. § 2255 for a
17 reduction in his sentence based on his alien status and challenges Bureau of Prisons'
18 policies which preclude him from participating in certain pre-release programs. Both
19 because he waived the right to challenge his sentence and because his Equal Protection
20 argument lacks merit, the Court **DENIES** the motion.

21 **DISCUSSION**

22 **I. WAIVER**

23 The Ninth Circuit recognizes strong public policy considerations justifying the
24 enforcement of a defendant's waiver of his right to appeal or collaterally attack a
25 judgment. *United States v. Novarro-Botello*, 912 F.2d 318, 321 (9th Cir. 1990).
26 Waivers play an important role in the plea bargaining process and help ensure finality.
27 *Id.* at 322. Generally, courts enforce a defendant's waiver of his right to appeal, as long
28 as the waiver was "knowingly and voluntarily made" and "encompasses the

1 defendant's right to appeal on the grounds claimed on appeal." *United States v. Nunez*,
 2 223 F.3d 956, 958 (9th Cir. 2000) (quoting *United States v. Martinez*, 143 F.3d 1266,
 3 1270-71 (9th Cir. 1998)).

4 Petitioner waived his right to collaterally attack his sentence in his plea
 5 agreement. Plea Agreement (Docket No. 67) ¶ XI. The plea agreement states that
 6 Petitioner "waives, to the full extent of the law, any right to appeal or to collaterally
 7 attack the conviction and any lawful restitution order, except a post-conviction
 8 collateral attack based on a claim of ineffective assistance of counsel." *Id.* Petitioner's
 9 knowing and voluntary waiver of his right to collaterally attack his sentence requires
 10 denial of his § 2255 motion.

11 II. EQUAL PROTECTION

12 Petitioner filed the present motion under 28 U.S.C. § 2255, but his Equal
 13 Protection challenge to the constitutionality of certain Bureau of Prisons' policies is
 14 better construed as a challenge to the manner in which his sentence is being executed
 15 under 28 U.S.C. § 2241. *See Hernandez v. Campbell*, 204 F.3d 861, 864 (9th Cir.
 16 2000) (per curiam) (instructing that petitions challenging the "manner, location or
 17 conditions of a sentence's execution must be brought pursuant to § 2241"); *see also*
 18 *Montano-Figuero v. Crabtree*, 162 F.3d 548, 549 (9th Cir. 1998) (illustrating that
 19 challenges to Bureau of Prisons' policies are challenges to the execution of an inmate's
 20 sentence). Construing his motion liberally, the Court considers Petitioner's Equal
 21 Protection claim under 28 U.S.C. § 2241. *See Zichko v. Idaho*, 247 F.3d 1015, 1020
 22 (9th Cir. 2001) (noting a court's "duty to construe pro se pleadings liberally").

23 Petitioner claims that Bureau of Prisons' policies that prevent him from
 24 participating in certain programs due to his alien status violate his right to Equal
 25 Protection. However, Bureau of Prisons policies preventing deportable aliens from
 26 participating in certain programs survive constitutional challenge. *Cf. McLean v.*
 27 *Crabtree*, 173 F.3d 1176, 1186 (9th Cir. 1999) (finding BOP exclusion of prisoners
 28 with detainers, including INS detainers, from community-based program based on

1 petitioners' alien status did not violate Equal Protection).

2 Additionally, a number of district courts have also found that policies preventing
3 alien prisoners from participating in certain pre-release programs are also justified
4 because the purpose of the program — helping prisoners reenter the community after
5 serving their sentence — is not advanced in the case of prisoners who will be deported
6 upon release. *See Lizarraga-Lopez v. United States*, 89 F. Supp. 2d 1166, 1169-70
7 (S.D. Cal. 2000) (upholding deportable alien's ineligibility for community
8 confinement); *United States v. Rodas-Jacome*, No. 06-CV-1481, 2007 WL 1231630,
9 at *4 (S.D. Cal. Apr. 24, 2007) (upholding restrictions for alien prisoners to obtain
10 "good time" credits in rehabilitation programs). Because deportable alien prisoners
11 pose a greater flight risk and the public policy justifications for pre-release programs
12 are inapplicable, the challenged policies survive constitutional scrutiny and Petitioner's
13 Equal Protection claim fails. The Court also denies relief under § 2241.

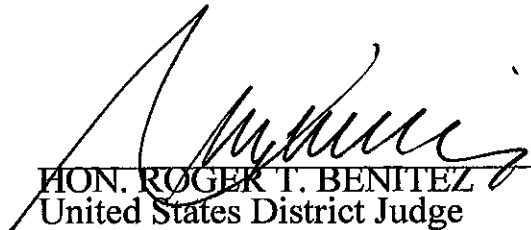
14 The Court **DENIES** a certificate of appealability because the issues are not
15 debatable among jurists of reason and there are no questions adequate to deserve
16 encouragement.

17 CONCLUSION

18 Petitioner's motion is **DENIED**. The Clerk shall close case number 13-CV-
19 2227-BEN.

20 **IT IS SO ORDERED.**

21
22 DATED: September 21, 2013


23 HON. ROGER T. BENITEZ
24 United States District Judge
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